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No. 03-1037

In The
Supreme Court of the United States

HON. SHARRON E. ANGLE, et al.,
MEMBERS OF THE NEVADA STATE ASSEMBLY
AND NEVADA STATE SENATE,

Petitioners,

v.

KENNY GUINN, Governor of the
State of Nevada, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Nevada

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF THE INITIATIVE AND REFERENDUM INSTITUTE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Initiative & Referendum Institute respectfully requests leave to file the attached amicus curiae brief in support of petitioners. The consent of the attorney for petitioners has been obtained. The consent of the attorneys for respondents was requested but refused.

The Initiative & Referendum Institute is a non-profit, non-partisan research and educational organization dedicated to the study of initiative and referendum, and is the leading academic center in the United States for the study of direct democracy. Its sister organization, the Initiative & Referendum Institute Europe, studies the use of direct democracy throughout Europe, and an affiliate of the Initiative & Referendum Institute will soon open in Asia. The Institute was founded based upon the proposition that unbiased and factual information regarding the initiative and referendum process should be readily available to citizens, governments, and the media. The Institute does not support or oppose any issue that appears on the ballot through the use of the initiative or referendum process, but does believe the process, though not perfect, has become a vital and thriving example of citizen participation in government and a staple in American democracy.

As part of its mission, the Institute seeks to ensure that the initiative and referendum process is not limited by unconstitutional and arbitrary restraint. Thus, the Institute has a direct interest in ensuring that, unlike the Nevada Supreme Court in this case, courts give proper deference to the will of the people by enforcing the terms of initiatives and referenda.

Good cause exists for permitting this brief to be filed because it does not restate the arguments presented by petitioners, but instead (1) sets forth a more detailed background to the adoption of the specific initiative at issue in this case; (2) sets forth a history of direct democracy and the use of initiatives and referenda in the United States; and (3) identifies authority not cited in the petition demonstrating the constitutional importance of ensuring that courts enforce, rather than eviscerate, initiatives and referenda.

Neither party would suffer any undue prejudice if this brief is accepted for filing.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF THE INITIATIVE & REFERENDUM INSTITUTE

INTEREST OF AMICUS CURIAE

The Initiative & Referendum Institute[1] is a non-profit, non-partisan research and educational organization dedicated to the study of initiative and referendum, and is the leading academic center in the United States for the study of direct democracy. Its sister organization, the Initiative & Referendum Institute Europe, studies the use of direct democracy throughout Europe, and an affiliate of the Initiative & Referendum Institute will soon open in Asia. The Institute was founded based upon the proposition that unbiased and factual information regarding the initiative and referendum process should be readily available to citizens, governments, and the media. The Institute does not support or oppose any issue that appears on the ballot through the use of the initiative or referendum process, but does believe the process, though not perfect, has become a vital and thriving example of citizen participation in government and a staple in American democracy.

As part of its mission, the Institute seeks to ensure that the initiative and referendum process is not limited by unconstitutional and arbitrary restraint. Thus, the Institute has a direct interest in ensuring that, unlike the Nevada Supreme Court in this case, courts give proper deference to the will of the people by enforcing the terms of initiatives and referenda.

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[1] The Initiative & Referendum Institute has no parent corporation, and no publicly held company owns 10 percent or more of the Initiative & Referendum Institute. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than the Initiative & Referendum Institute or its counsel, make a monetary contribution to the preparation or submission of this brief.

FACTUAL BACKGROUND

A. The initial passage of the Gibbons Tax Restraint Initiative by Nevada voters in 1994.

In 1992, Nevada's neighboring state, Arizona, passed an initiative requiring a two-thirds majority in the legislature to enact any tax increase. Virginia I. Postrel, *Voting Against Regulation*, Las Vegas Rev.-J., Nov. 18, 1992, at 9B. The following year, Nevada voters qualified the Gibbons Tax Restraint Initiative for the ballot, on which it appeared as "Question 11." Jane Ann Morrison, *Two Anti-Tax Propositions Losing Steam*, Las Vegas Rev.-J., May 4, 1994, at 1B; Jane Ann Morrison, *Gubernatorial Candidate Turns in Tax Initiative Petitions*, Las Vegas Rev.-J., June 2, 1994, at 2B.

The Gibbons Tax Restraint Initiative required a two-thirds vote of the state legislature to approve taxes. Jane Ann Morrison, *Group Targets Hikes in Fees, Taxes*, Las Vegas Rev.-J., Oct. 30, 1993, at 1B. If the legislature failed to muster a two-thirds majority, the proposed tax could be placed before the voters in the next general election, and passed by a majority vote. Major Garrett, *No Taxation Without a Vote? It's Coming Soon: Direct Democracy Catches On*, Wash. Times, July 21, 1994, at A10; Ed Vogel, *Gibbons' Tax Restraint Plan Debated*, Las Vegas Rev.-J., Oct. 26, 1994, at 2B.

Question 11 was criticized on the ground that it allowed a minority in the legislature to thwart the majority's will. Vogel, *Gibbons' Tax Restraint Plan Debated*, *supra*, at 2B; Albert Johns, *Voters Should Investigate Flaws of Gibbons Tax Restraint Initiative ACTION SENIORS*, Las Vegas Rev.-J., Sept. 18, 1994, at 7J. Nonetheless, the initiative passed with 78 percent of the vote in the 1994 election. Ed Vogel, *Senate OKs Measure Requiring Two Votes on Any Tax Hikes*, Las Vegas Rev.-J., June 23, 1995, at 7B.

B. The second passage of the Gibbons Tax Restraint Initiative by Nevada voters in 1996.

In the November 1996 election, Nevadans again overwhelmingly approved – by more than 70 percent – Question 11. *Voters Come Through*, Las Vegas Rev.-J., Nov. 7, 1996, at 10B; Sean Whaley, *Gibbons Off to Congress, Leaving Tax Legacy Behind*, Las Vegas Rev.-J., Nov. 8, 1996, at 1B. In doing so, the voters rejected efforts by the legislature to pass a less-restrictive alternative plan which did not include the two-thirds provision. Vogel, *Senate OKs Measure Requiring Two Votes on Any Tax Hikes, supra,* at 7B; *Legislature Offers Tax-Restraint Choice*, Las Vegas Rev.-J., July 3, 1995, at 2B; Jake Mattox, *Business Community Watching Ballot Questions*, Las Vegas Bus. Press, Oct. 21, 1996. In the same election, southern Nevada voters also approved a massive bond measure for new schools and a substantial property tax increase for additional police officers – suggesting support for Question 11 was not about preventing tax increases so much as giving voters greater control over those increases. *Voters Come Through*, *supra*, at 10B.

C. The 2003 nullification of the Gibbons Tax Restraint Initiative.

1. The Legislature's manufacturing of a "crisis."

A review of tax increases approved by the Nevada legislature before Question 11 took effect showed that few of those increases would have been affected by the two-thirds requirement. Whaley, *Gibbons Off to Congress, Leaving Tax Legacy Behind*, *supra*, at 1B. And, in the years following the passage of Question 11, only 35 bills out of 1,167 introduced required a two-thirds vote, and the two-thirds majority requirement did not play any major

role with respect to those bills. Sean Whaley, *Supermajority Vote Not Taxing to Lawmakers*, Las Vegas Rev.-J., Aug. 17, 1997, at 1B.

By the end of 2002, however, Nevada was facing a shortfall in state revenues and Governor Guinn proposed nearly $1.1 billion in new taxes over the next two years, representing a 28 percent increase over current spending. Ed Vogel, *State of the State: Guinn Urges Courage*, Las Vegas Rev.-J., Jan. 21, 2003, at 1A; Ed Vogel, *Magazine Ranks Nevada Tax System Nation's Worst*, Las Vegas Rev.-J., Feb. 3, 2003, at 8A; Ed Vogel, *Guinn Cruises to Easy Re-Election Win Over Neal*, Las Vegas Rev.-J., Nov. 6, 2002, at 4B.

Instead of funding a complete budget at one time, the Nevada legislature used existing revenues to fund non-education portions of the budget, leaving the state's $1.65 billion public schools budget 50 percent unfunded for 2003-2005. Cert. Pet. 5-6; Sean Whaley, *Initiative Petition: New Amendment Pushed*, Las Vegas Rev.-J., July 13, 2003, at 1B. By June 2003, bills to levy record tax increases had failed in both of Nevada's legislative chambers. Ed Vogel, *Special Session: Tax Measures Fail*, Las Vegas Rev.-J., June 8, 2003, at 3A. Although majorities in both houses had backed the tax measures, neither house could muster the two-thirds support necessary to pass a tax increase under Question 11. *Id.*

After two special sessions failed to resolve the legislative stalemate over tax increases, and with the new fiscal year beginning, Governor Guinn sued the legislature rather than permit the matter to be submitted directly to the voters as required by Question 11 when a two-thirds legislative majority cannot be achieved. *Id.*; Whaley, *Initiative Petition: New Amendment Pushed*, *supra*, at 1B. Polls showed that had the proposed tax increase been submitted to the voters, its fate was uncertain. Jane Ann Morrison, *Poll: Voters Favor Anti-Tax Legislators, School Spending*, Las Vegas Rev.-J., July 11, 2003, at 1A.

2. The Nevada Supreme Court's nullification of the constitutional requirements set by the voters for raising taxes.

In response to Governor Guinn's lawsuit, the Nevada Supreme Court took the novel step of refusing to enforce the provision of the state constitution requiring two-thirds of the legislature to vote in favor of a tax increase, and instead determined that a simple majority would be sufficient to pass the increase. *Guinn v. State Legislature*, 71 P.3d 1269, 1275-76 (Nev. 2003).

The court concluded that the "substantive educational rights" in the constitution must trump the mere "procedural requirement" or "process requirement" that the two-thirds provision represented. *Id.* at 1275-76. With no apparent relevance to any constitutional analysis, the court emphasized that "[i]n 1993, the Legislature rejected a resolution that proposed to amend the Constitution to create an exception to the simple majority rule and require a two-thirds majority of each house to increase existing taxes or impose new taxes. Ultimately, by initiative, the citizens accepted an identical proposal as a constitutional amendment." *Id.* at 1273.

3. The continuing impact of the Nevada Supreme Court's opinion.

Legal experts and politicians feared the court's decision setting aside the state's supermajority requirement could have implications in the fourteen other states with supermajority or other constitutional restrictions on legislative tax power. Carri Geer Thevenot, *Experts Discuss Ramifications of Ruling Against Two-Thirds Majority Vote to Raise Taxes*, Las Vegas Rev.-J., July 12, 2003, at 1A; Lisa Kim Bach, *Republicans Ask Supreme Court to Revisit Decision on Taxes*, Las Vegas Rev.-J., July 22, 2003, at 1A; Ed Vogel, *Divisive Tax Ruling Argued*, Las Vegas

Rev.-J., July 26, 2003, at 1B. Indeed, soon after the decision, California State Superintendent of Public Instruction Jack O'Connell announced that he intended to ask the California Supreme Court to force a "Nevada-style break in the state budget deadlock" by "'seeking a ruling that would suspend the two-thirds requirement for passing a budget or increasing revenues, and instead, allow a simple majority.'" Daniel Weintraub, *It's Catching: Suspend the Constitution*, Sacramento Bee, July 17, 2003, *available at* http://www.sacbee.com/static/weblogs/insider/archives/2003-07.html.

One legal scholar, UCLA law professor Eugene Volokh, characterized the decision as "shameful," and pointed out that under the court's assumption "that procedural requirements are somehow less important than substantive rights," even a simple majority requirement for a tax increase could be nullified as a mere "'procedural requirement that is general in nature.'" Eugene Volokh, *The Volokh Conspiracy*, July 10, 2003, *at* http://volokh.com/2003_07_06_volokh_archive.html. Gary Peck, executive director of the ACLU of Nevada, said members of the organization were troubled by the reasoning of the Nevada Supreme Court in reaching its decision, "'particularly the dubious distinction it made between substantive and procedural constitutional rights,'" which "'might be used to improperly create a hierarchy of rights inconsistent with core constitutional principles.'" Thevenot, *Experts Discuss Ramifications of Ruling Against Two-Thirds Majority Vote to Raise Taxes*, *supra*, at 1A.

On July 21, 2003, both houses of the Nevada legislature passed an $836 million tax package funding the public schools and state government by a two-thirds vote. Sean Whaley & Ed Vogel, *State Legislature: Budget Approved*, Las Vegas Rev.-J., July 22, 2003, at 1A. Fifteen members – one more than needed to block a two-thirds vote in the 42-member Assembly – were previously steadfast in their refusal to support the tax increase, due to its

size. *Id.* That changed when Assemblyman John Marvel provided the crucial 28th vote necessary to achieve the two-thirds supermajority in the Assembly at 11:37 p.m. *Id.*; Ed Vogel, *More Time Sought in Tax Case*, Las Vegas Rev.-J., Dec. 6, 2003, at 4B. The Supreme Court decision caused the two-thirds vote to occur as Marvel said "he voted for the tax increase only to avoid a 'constitutional crisis' if the Legislature violated the two-thirds rule." Ed Vogel, *More Time Sought in Tax Case*, Las Vegas Rev.-J., Dec. 6, 2003, at 4B; Ed Vogel, *Experts Say High Court Should Not Rehear Its Decision*, Las Vegas Rev.-J., July 29, 2003, at 5B.

The Legislative Counsel conceded the role the court's decision played in compelling the two-thirds supermajority vote: "'Its interpretation of the Nevada Constitution led to a chain of events that ultimately resulted in the passage by a two-third majority vote of the constitutionally mandated election funding and the revenue necessary to support it.'" Vogel, *Experts Say High Court Should Not Rehear Its Decision*, *supra*, at 5B.

After the vote, Nevada Assembly Minority Leader Lynn Hettrick expressed continuing concern about the Nevada Supreme Court's decision despite the two-thirds vote: "'Legislatures are not secure across this entire land with that decision.'" Bach, *Republicans Ask Supreme Court to Revisit Decision on Taxes*, *supra*, at 1A. From the opposite perspective, an amicus brief filed by the Nevada State Education Association in opposition to a rehearing petition in the Nevada Supreme Court urged the court not to withdraw the opinion because a similar problem is "'likely to recur.'" Vogel, *Divisive Tax Ruling Argued*, *supra*, at 1B.

SUMMARY OF ARGUMENT

"We the people of the United States . . . do ordain and establish this Constitution for the United States of America." U.S. Const. pmbl. James Madison further elaborated that "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived." The Federalist No. 49, at 313-14 (James Madison) (Clinton Rossiter ed., 1961).

Through its constitutional initiative process, Nevada citizens amended the state's constitution to require a two-thirds vote of the legislature to raise taxes. But, through judicial fiat, the Nevada Supreme Court effectively read that provision out of the constitution, finding that a simple majority vote will suffice to raise taxes when the two-thirds requirement proves inconvenient. The Nevada Supreme Court has now enshrined in the law two radical and dangerous legal propositions – (1) that constitutional provisions passed via the initiative or referendum process are entitled only to second-class status; and (2) that constitutional requirements governing the vote requirements for imposing taxes are merely "procedural" requirements and readily subject to non-enforcement.

The petition for writ of certiorari demonstrates that the opinion is erroneous and worthy of review by this court for a number of reasons. Instead of repeating the specific arguments advanced in the petition, and consistent with the educational mission of the Initiative & Referendum Institute, we will set forth two complementary points demonstrating the vital importance of the issues raised by this petition.

First, we will outline the long historical commitment in the United States to the use of direct democracy by citizens to advance and improve society. Second, we will demonstrate the substantial commitment of courts across the nation to the enforcement of initiatives and referenda.

Those courts, in conflict with the Nevada Supreme Court, have recognized that the enforcement of initiatives and referenda passed by the people represents a vital component of our democracy.

LEGAL ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE OF THE IMPORTANCE OF INITIATIVES AND REFERENDA TO OUR DEMOCRACY.

A. The United States has a long-standing historical commitment to direct democracy.

1. Direct democracy via citizen assemblies predated the Revolution.

Direct democracy dates back to ancient times. In many of the ancient Greek city states, all adult citizens were permitted to meet and participate directly in decisions made by the government. John Allswang, The Initiative and Referendum in California, 1898-1998 2 (2000); Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807, 839 (2002). Rome and Carthage also permitted citizens to participate directly in lawmaking. Natelson, at 839-40.

This tradition of direct democracy was revived in New England, where citizens gathered in town meetings to vote on ordinances and other issues relating to governance of their communities. M. Dane Waters, Initiative and Referendum Almanac 3 (2003); David D. Schmidt, Citizen Lawmakers: The Ballot Initiative Revolution 3-4 (1989); Allswang, *supra*, at 2; Clayton P. Gillette, *Is Direct Democracy Anti-Democracy?*, 34 Willamette L. Rev. 609, 615-16 (1998); William T. Mayton, *Direct Democracy, Federalism & The Guarantee Clause*, 2 Green Bag 269, 272-73 (1999).

In addition, even where a representative body held ultimate authority, popular assemblies could dictate to their representatives how to vote on specific issues. Gillette, *supra*, at 615.

2. The popular referendum played a significant role in the shaping and ratification of state constitutions in the aftermath of Independence.

Although ultimately not included in its final form, Thomas Jefferson proposed adding a provision for legislative referendum to the 1775 Virginia constitution based upon his view that the people are sovereign and should approve any future changes to the constitution. Waters, *supra*, at 3; Schmidt, *supra*, at 4. By 1776, the new Georgia state constitution required a majority of voters in each county to sign petitions calling for a constitutional convention before any future constitutional amendments could be adopted. *Id.*

In 1778, Massachusetts held a statewide referendum to ratify its new constitution. *Id.* Similar voter approval of state constitutions occurred in New Hampshire in 1792, in Connecticut in 1818, in Maine in 1819, in New York in 1820 and in Rhode Island in 1824. *Id.*; *see* Gillette, *supra*, at 616. All states entering the union after 1857 were required to submit their constitutions to the voters for approval. Waters, *supra*, at 3; Schmidt, *supra*, at 5.

This activity caused Alexis De Tocqueville to note that:

> At the present day the principle of the sovereignty of the people has acquired, in the United States, all the practical development which the imagination can conceive. It is unencumbered by those fictions which are thrown over it in other countries, and it appears in every possible form, according to the exigency of the occasion. Sometimes the laws are made by the people in a body, as at Athens; and sometimes its representatives,

> chosen by universal suffrage, transact business in its name, and under its immediate supervision.

Alexis De Tocqueville, Democracy in America 57 (Richard D. Heffner, ed., 1984).

3. By the beginning of the 20th Century, the Progressive and Populist movements caused many states to amend their constitutions to provide their citizens with the initiative and referendum in order to promote needed reforms.

At the dawn of the twentieth century, the Populist and Progressive movements contended that government was not responsive to the major problems of the day because it was controlled by wealthy special interests. Waters, *supra*, at 3; Schmidt, *supra*, at 5-8. Some of their proposed reforms included women's suffrage, secret ballots, direct elections of United States Senators, recall, and primary elections. Waters, *supra*, at 3; *see* Schmidt, *supra*, at 9. The initiative process was viewed as vital to the passage of the other reforms because the entrenched interests who controlled state legislatures were blocking their passage. Schmidt, *supra*, at 7-8; Waters, *supra*, at 3.

William Jennings Bryan argued that the initiative "is the most effective means yet proposed for giving the people absolute control over their government." John Dinan, *Framing a "People's Government": State Constitution-Making in the Progressive Era*, 30 Rutgers L.J. 933, 979-80 (1999). Theodore Roosevelt, in his "Charter of Democracy" speech, stated that "I believe in the Initiative and Referendum, which should be used not to destroy representative government, but to correct it whenever it becomes misrepresenatative." Schmidt, *supra*, at 9. Woodrow Wilson said: "We are cleaning house and in order to clean house the one thing we need is a good broom. Initiative and Referendum are good brooms." *Id.* at 10. Samuel Gompers, president of

the American Federation of Labor (AFL), viewed the initiative and referendum process "as a peaceful way to achieve union objectives, vastly preferable to costly, potentially bloody strikes." *Id.* at 6. State AFL offices became a driving force behind the passage of the initiative and referendum process around the nation. *Id.* at 7.

Numerous states adopted the initiative and referendum around the turn of the twentieth century. Waters, *supra*, at 4, 294; Schmidt, *supra*, at 8, 250.

4. Initiatives and referenda are an important part of our modern democracy.

a. Nevada, like many other states, provides its citizens with the initiative process.

Today, twenty-four states have an initiative process of some sort. Waters, *supra*, at 11. Nevada is one of eighteen states having a *constitutional* initiative process. *Id.* at 11-12. For constitutional initiatives, Nevada and 15 other states use a "direct initiative amendment" approach, under which a constitutional amendment is proposed by the people and placed directly on the ballot for voter approval or rejection.[2] *Id.* The other two states use an "indirect initiative amendment" approach, under which a constitutional amendment proposed by the people must

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[2] To put an initiative on the Nevada ballot, valid signatures from at least 13 of Nevada's 17 counties and equal to at least 10 percent of the total votes cast at the last general election must be obtained. Dean Heller, Secretary of State, State of Nevada Initiative & Referendum Guide 2002 3, *available at* http://sos.state.nv.us/nvelection/int_ref/initiative.pdf; Nev. Const. art. XIX, § 2, cl. 2. If approved by a majority vote, the initiative is submitted again to the voters in the next general election. Heller, *supra*, at 3; Waters, *supra*, at 26. If the initiative passes a second time, it becomes part of the Nevada Constitution. Heller, *supra*, at 3; Nev. Const. art. XIX, § 2, cl. 4.

first be submitted to the state legislature before the amendment can appear on the voter ballot. *Id.*

Nevada is also one of 21 states with a *statutory* initiative process. *Id.* Nevada uses an "indirect initiative statute" (IDS) approach *id.*, under which a new state statute or an amendment to an existing state statute can be proposed. Heller, *supra*, at 1. Under the IDS approach, used in nine states (including Nevada), a statute proposed by the people must first be submitted to the state legislature for consideration before it can be placed on the voter ballot. Waters, *supra*, at 11. By contrast, under the direct initiative statute approach used in 14 other states, statutes proposed by the people are placed directly on the ballot. *Id.*[3]

b. Laws adopted in Nevada and nationwide through initiatives and referenda have spanned the ideological spectrum.

Despite the widespread availability of initiatives and referenda, laws resulting from them comprise an extremely small percentage of all laws passed. Natelson, *supra*, at 807-08. Since 1904, when the first statewide initiative appeared on a ballot, citizens in 24 states have placed approximately 2,051 statewide initiatives on the ballot and have approved 840, or 41 percent, of them. Waters, *supra*, at 7.

Nonetheless, a wide range of issues, covering all portions of the ideological spectrum, have become law across the country due to the initiative and referendum process. For example, initiatives and referenda have

[3] Two of the 21 states having the statutory initiative procedures – Utah and Washington – allow statutory initiatives through both the direct initiative statute and indirect initiative statute methods. Waters, *supra*, at 11.

conferred suffrage to women, abolished poll taxes, created the eight hour workday, legalized physician-assisted suicide, legalized medical marijuana, outlawed the use of steel traps in hunting, permitted the sale of yellow margarine, permitted movie theaters and other stores to be open on Sunday, provided for the election of politicians in direct primaries, adopted various campaign finance reforms, imposed term limits on elected officials, and adopted bottle taxes and other measures to protect the environment. *Id.* Initiatives and referenda have also ended bilingual education, required parents to be notified prior to a minor's abortion, prohibited states from funding abortions, adopted and abolished prohibition, and adopted and abolished the death penalty. *Id.*

The experience in Nevada is consistent with this national trend. Twenty-five of the 39 initiatives on the ballot between 1918 and 2000 have passed, for an overall passage rate of 64 percent. Waters, *supra*, at 295-96. As in other states, initiatives in Nevada have spanned the political spectrum. *Id.* at 294; Schmidt, *supra*, at 250-51.

Since 1978, the vast majority of Nevada's initiatives (20 of 26) have concerned taxation, term limits, or campaign finance reform. Waters, *supra*, at 295-96; State Initiative & Referendum Petitions Circulating in 2002, *available at* http://sos.state.nv.us/nvelection/int_ref/2002 int_refer.htm. In 2000, however, the voters passed both a civil rights initiative banning same sex marriage and a drug policy reform initiative permitting the medical use of marijuana – illustrating in a single election cycle that use of Nevada's initiative process has not been limited to one political ideology. Waters, *supra*, at 296.

c. The initiative and referendum process has often been used by the people to address tax issues.

Taxes rank first on the list of subjects that citizens have historically addressed using the initiative process. *Id.* at 481. In recent years, voter initiatives have been used by tax reform advocates concerned that the elected establishment is unresponsive to their cause. *Id.* at 496. For example, the so-called voter "tax revolt" movement has been sustained by the initiative process. *Id.*

The modern starting point for this phenomenon was California's Proposition 13, a 1978 property tax limitation measure. *Id.* In 1980, Massachusetts voters restricted local property taxes to no more than 2-1/2 percent of a home's full and fair cash value, and required a two-thirds voter approval for any increase in the rate. *Id.* The same year, Missourians enacted a measure limiting total state tax and spending growth, and subjecting most local tax and fee increases to two-thirds voter consent in the affected jurisdiction. *Id.* at 496-497. Over the next decade, similar initiatives met with varying degrees of success in Michigan, Montana, Nebraska, Oregon, and Washington. *Id.* at 497.

These efforts, which were aimed at property taxes, led to a second wave of tax initiatives as state legislatures explored other sources of funding for government expenditures. *Id.* This second wave focused more heavily on processes (e.g., voter approval and legislative supermajorities) than outcomes. *Id.* For example, in 1992 Oklahoma voters required a three-fourths legislative "supermajority" or a majority vote of the people for all state-level tax increases. *Id.* The same year, Colorado voters limited the growth of state spending and revenues to the rate of inflation and population. *Id.*

Prior to 1978, only four voter approval/supermajority tax safeguards could be found in state constitutions. *Id.*

Since 1978, ten such laws have been enacted. *Id.* In fact, in the same election year that Nevada voters approved the initiative at issue here, voters in Florida, South Dakota, California and Oregon similarly made tax increases more difficult. Pete Du Pont, Editorial, *The Little Noticed Tax Revolt of 1996*, Orange County Reg., Nov. 17, 1996, at J04; James Perry, Commentary, *Americans Want Less Taxation, Now*, Wash. Times, Dec. 12, 1996, at A19; *Restraining Government*, Las Vegas Rev.-J., Jan. 13, 1997, at 6B.

B. The Nevada Supreme Court is in conflict with many other courts that have recognized the vital importance of initiatives and referenda.

1. Courts should liberally construe and defer to citizen-passed initiatives and referenda.

The Nevada Supreme Court has evidenced a hostility to the fundamental democratic principle that citizens should be able to make laws and, in essence, has relegated initiatives and referenda to second-class status. *See Guinn,* 71 P.3d at 1273-76. That view of initiatives and referenda is in conflict with decisions from numerous other courts, including this one.

This court has noted that "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination or prejudice." *James v. Valtierra*, 402 U.S. 137, 141 (1971); *see also City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976) (stating a referendum is "a basic instrument of democratic government"); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997) ("An expression of the popular will expressed by majority plebiscite . . . must not be cavalierly disregarded.").

Various state courts have similarly affirmed the importance of initiatives and referenda to our democracy. For example, the adoption of a constitutional provision permitting citizen initiatives has been held to have "'created a

people's process. It was intended to provide both a check on legislative action and a means of circumventing an unresponsive [legislature]. It presented to the people the direct opportunity to enact statutes regardless of legislative opposition. It projected a means by which the people could move forward on measures which they deemed necessary and desirable without the danger of their will being thwarted by legislative action.'" *Citizens for a Competitive Massachusetts v. Sec'y of the Commonwealth*, 594 N.E.2d 855, 858 (Mass. 1992); *see also Miller v. Sec'y of the Commonwealth*, 697 N.E.2d 123, 126 (Mass. 1998); *Byre v. City of Chamberlain*, 362 N.W.2d 69, 79 (S.D. 1985); Lino A. Graglia, *Revitalizing Democracy*, 24 Harv. J.L. & Pub. Pol'y 165, 168 (2000).

"'Declaring it "the duty of the courts to jealously guard this right of the people" [citation], the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process."'" *Rossi v. Brown*, 889 P.2d 557, 560, 38 Cal. Rptr. 2d 363, 366 (1995); *see also Wagner v. Sec'y of State*, 663 A.2d 564, 566 (Me. 1995); *Oliver v. City of Tulsa*, 654 P.2d 607, 613 (Okla. 1982).

Accordingly, "'[i]t has long been our judicial policy to apply a liberal construction to [initiatives and referenda] wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.'" *Rossi*, 889 P.2d at 560; *see also Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996); *Pacuilla v. Cochise County Bd. of Supervisors*, 923 P.2d 833, 834 (Ariz. 1996); *Porter v. McCuen*, 839 S.W.2d 521, 522 (Ark. 1992); *League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996); *Citizens for a Competitive Massachusetts v. Sec'y of the Commonwealth*, 594 N.E.2d at 858; *State ex rel. Harper v. Waltermire*, 691 P.2d 826, 829 (Mont. 1984); *State ex rel. Hodges v. Taft*, 591 N.E.2d 1186, 1189 (Ohio 1992); *Oliver*, 654 P.2d at 613.

Although this court has approved the initiative and referendum process in general terms, it has yet to address whether, and under what circumstances, a court can ever override an initiative or referendum in order to achieve a desired result. This court should therefore grant the petition for writ of certiorari and define the extent to which citizen initiatives and referenda must be accorded deference by the courts under our republican government.

2. Courts should recognize that failing to enforce a citizen initiative or referendum violates the fundamental rights of the voters who passed them.

The Nevada Supreme Court justified its failure to enforce the tax provision contained in the Nevada Constitution on the basis that it was merely a "procedural" provision. *See Guinn*, 71 P.3d at 1275-76. In so doing, the court essentially nullified the votes of the people in two separate Nevada elections. This failure to give effect to the will of the people violated the fundamental rights of those voters, in conflict with authority from other jurisdictions.

"The initiative and referendum are not rights 'granted the people, but . . . power[s] reserved by them.'" *Rossi*, 889 P.2d at 560; *see also Municipality of Anchorage v. Frohne*, 568 P.2d 3, 8 (Alaska 1977); *Winkle v. City of Tucson*, 949 P.2d 502, 504 (Ariz. 1997); *In re Opinion of Justices*, 275 A.3d 800, 803 (Me. 1971); *State ex rel. Hodges*, 591 N.E.2d 1189; *Byre*, 362 N.W.2d at 79; *State ex rel. Heavey v. Murphy*, 982 P.2d 611, 615 (Wash. 1999).

"The reserved right and power of initiative is a fundamental right. . . . For decades, we have recognized that the right to vote is a fundamental right. . . . Initiative is the power of a voter to directly legislate via exercising the right to vote. Like the right to vote generally, the initiative right guarantees participation in the political process. It is a constitutionally guaranteed right that 'forms an implicit

part of the life of a free citizen in a free society.' The initiative right encourages political dialogue and allows the general populace to have substantive and meaningful participation in enacting legislation that impacts society. It is democracy in its most direct and quintessential form." *Gallivan v. Walker*, 54 P.3d 1069, 1080-81 (Utah 2002) (citations omitted); *see also Bd. of County Comm'rs v. County Road Users Ass'n*, 11 P.3d 432, 439 (Colo. 2000) ("'Like the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government.'").

"[A]lthough the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993); *see also Idaho Coalition United for Bears v. Cenarrussa*, 342 F.3d 1073, 1077 & n.7 (9th Cir. 2003); *Wyman v. Sec'y of State*, 625 A.2d 307, 311 (Me. 1993).

These courts, unlike the Nevada Supreme Court, have all recognized that a citizen initiative or referendum cannot be ignored without infringing the fundamental rights of those who voted for it. This court should therefore grant the petition for writ of certiorari and define the parameters for determining when the nullification of a vote of the people impermissibly violates their fundamental rights.

CONCLUSION

In Federalist No. 39, Madison argued: "we may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people. . . . It is *essential* to such a government that it be derived from the great body of the society. . . ." The

Federalist No. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961). The Nevada Supreme Court's decision turns that founding principle upside down, negating the will of Nevada's citizens and granting the Legislature powers derived not from "the great body of the people," but rather bestowed upon that legislative body by judicial fiat. Certiorari should be granted to confirm that the initiative and referendum power is a fundamental right and a core aspect of our republican government, and cannot be thwarted by a state judiciary for reasons of mere political expediency.

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